

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 24, 2008 Session

IN RE ESTATE OF CECILE A. TROUTMAN

**Appeal from the Circuit Court for Hamilton County
No. 06C1543 W. Jeffrey Hollingsworth, Judge**

No. E2007-01959-COA-R3-CV - FILED JUNE 25, 2008

In this will contest case, the trial court granted the proponent's motion for summary judgment and upheld the validity of the will. We find no genuine issue of material fact regarding Decedent's mental capacity at the time of executing the will and undue influence. Therefore, we affirm the grant of summary judgment by the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Albert L. Watson, III, Chattanooga, Tennessee, for the Appellant, Carol Ray.

R. Dee Hobbs, Chattanooga, Tennessee, for the Appellee, Diane Francisco.

OPINION

I. Background

Cecile A. Troutman ("Decedent") executed her will on January 19, 2001. At the time of the will's execution, she was living with her sister, Isobel Troutman. Neither Decedent nor her sister ever married, and they had lived together for some time. Decedent and Isobel Troutman executed their wills at approximately the same time, and each left her entire estate to the other sister. At the time she executed her will, Decedent was suffering from Alzheimer's disease and was essentially bedridden, but as discussed further hereinafter, Decedent's physician testified that she was lucid and able to mentally function approximately thirty percent of the time. The will was drafted by attorney Rebecca Lynn Hicks and witnessed by Ms. Hicks and her law partner William McPheeters. Their affidavit pursuant to Tenn. Code Ann. § 32-2-110 was notarized by their assistant Pam Corvin. It is undisputed that the will was duly executed in accordance with Tennessee law.

Isobel Troutman predeceased Decedent, and Decedent inherited Isobel's estate. Decedent's will bequeathed her real property to Diane Francisco, her niece, and Diane Francisco's husband

Donald Francisco, who were Decedent's caregivers during her final years. The will made two monetary bequests and provided that the remainder of Decedent's estate "be paid over to my Executor and Executrix to such persons as they see fit other than my Executor and Executrix" The Franciscos were named Executor and Executrix.

After Decedent's death on February 23, 2005, the Franciscos petitioned to probate her will. Thereafter, five of Decedent's nieces and nephews filed this action contesting the will on the grounds of lack of testamentary capacity and undue influence on the part of Isobel Troutman and the Franciscos. Executrix Diane Francisco¹ moved for summary judgment, which was granted by the trial court upon its findings that the contestants' proof failed to present a genuine issue of material fact upon the issues of testamentary capacity and undue influence and that the will was valid.

II. Issue Presented

The contestants² appeal, raising the issue of whether the trial court erred in granting the motion for summary judgment filed by the Executrix and ruling the will to be valid on the grounds that no genuine issue of material fact was presented regarding Decedent's testamentary capacity and alleged undue influence.

III. Analysis

A. Standard of Review

Our standard of review of a summary judgment was recently restated by the Tennessee Supreme Court as follows:

Summary judgment is to be granted by a trial court only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.03; ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993). The party seeking summary judgment bears the burden of demonstrating that no genuine issues of material fact exist and that he is entitled to judgment as a matter of law. ***Godfrey v. Ruiz***, 90 S.W.3d 692, 695 (Tenn. 2002). In reviewing the record to determine whether summary judgment requirements have been met, we must view all the evidence in the light most favorable to the non-moving party. ***Eyring v. Fort Sanders Parkwest Med. Ctr., Inc.***, 991 S.W.2d

¹Donald Francisco died after the will was submitted for probate and during the pendency of this action in the trial court.

²It is not entirely clear from the record which of the five contestants is appealing the trial court's decision. Although the notice of appeal states that "all Contestants hereby appeal," only contestant Carol Ray filed the Tenn. R. App. P. 24(b) notice of no transcript, and only Carol Ray's name appears on the appellant's brief, which is styled "Brief of Defendant/Appellant Carol Ray."

230, 236 (Tenn. 1999); *Byrd*, 847 S.W.2d at 210-11. We review a trial court's grant of summary judgment de novo, according no presumption of correctness to the trial court's determination. *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Godfrey*, 90 S.W.3d at 695.

Boren v. Weeks, — S.W.3d —, No. M2007-00628-SC-R11-CV, 2008 WL 1945985, at *4 (Tenn. May 6, 2008).

B. Testamentary Capacity

The will contestants argue that Decedent lacked the requisite testamentary capacity to execute the will because she suffered from Alzheimer's disease and was in a feeble and bedridden physical state when the will was executed. As noted, it is undisputed that the will was duly executed, and thus the proponents have established a prima facie case of the will's validity because "[p]roof of due execution . . . gives rise to a presumption that the testator was capable of making a will." *In re Estate of Eden*, 99 S.W.3d 82, 88 (Tenn. Ct. App. 1995); *Keasler v. Keasler*, 973 S.W.2d 213, 217 (Tenn. Ct. App. 1997). The contestants therefore have the burden of proving lack of testamentary capacity or undue influence. *Id.*; *In re Estate of Elam*, 738 S.W.2d 169, 171 (Tenn. 1987).

The Tennessee Supreme Court in *Elam* set forth the principles that guide our courts in determining whether a testator possessed the requisite mental capacity to execute a will at the time of execution, providing as follows:

The law requires that the testator's mind, at the time the will is executed, must be sufficiently sound to enable him or her to know and understand the force and consequence of the act of making the will. *American Trust & Banking Co. v. Williams*, 32 Tenn. App. 592, 225 S.W.2d 79, 83 (1948). The testator must have an intelligent consciousness of the nature and effect of the act, a knowledge of the property possessed and an understanding of the disposition to be made. *Goodall v. Crawford*, 611 S.W.2d 602, 604 (Tenn. App. 1981). While evidence regarding factors such as physical weakness or disease, old age, blunt perception or failing mind and memory is admissible on the issue of testamentary capacity, it is not conclusive and the testator is not thereby rendered incompetent if her mind is sufficiently sound to enable her to know and understand what she is doing. *American Trust, supra*; 79 Am. Jur. 2d *Wills* § 77 (1975).

The opinions of lay witnesses are admissible on soundness of mind if they are based on details of conversations, appearances, conduct or

other particular facts from which the state of mind may be judged.
American Trust, *supra*, 225 S.W.2d at 84. Further,

[i]n determining testamentary capacity, the mental condition of the testator at the very time of executing the will is the only point of inquiry; but evidence of mental condition both before and after making the will, if not too remote in point of time, may be received as bearing upon that question.

Insofar as it has a reasonable tendency to bear upon the mental capacity of the testator when the will was executed, evidence of his physical condition both before and after the date of the will is also admissible. But, apart from its effect upon the mind, the physical condition of the testator has no bearing on the issue[.]

In re Estate of Elam, 738 S.W.2d at 171-72; accord *Childress v. Currie*, 74 S.W.3d 324, 328 (Tenn. 2002).

The record in the present case contains portions of the deposition of Dr. Edward D. Johnson, who for many years was Decedent's treating physician and personal acquaintance. Dr. Johnson testified that Decedent suffered from Alzheimer's disease in 2001 when the will was executed, and further regarding Decedent's mental condition as follows:

A: I would say that 70 percent of the time, that Cecile was basically irrational. I was over there at times, 30 percent of the time, she could carry on a completely lucid, normal conversation, remember things of the past and then, three hours later, would switch and be irrational again.

Now, I have no idea when she signed this [the will]. I was not there. I have no idea as to where Cecile was in her mind state, but 30 percent of the time, she could be lucid. So 70 percent of the time – and these are just rough figures, but I think for the jury and you gentlemen, that's my – I'm just thinking back that they had to put locks on the doors because Cecile would wander out, but at times I could sit and carry on a very lucid conversation with her. And I do not know when she actually signed this will, where her mind really was.

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Q: When a person has even an advanced stage of Alzheimer's, when they have lucid intervals, they are capable of functioning pretty much the way they functioned before they had the Alzheimer's; is that not true?

A: Yes.

Q: Okay. On the other hand, when they are illucid, they can't do anything?

A: Basically, yes.

Q: Basically, yes. You were – you cannot give an opinion within a reasonable degree of medical certainty as to this person's lucidity or illucidity on January 19th, 2001, can you?

A: No.

Q: Are you aware of any special pressure or any special influence that existed the day this particular will was executed on January the 19th of 2001?

A: I have no idea.

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Q: Given the state of her disease on or about January the 19th of 2001, do you not agree that that disease was not so prevalent or at such an advanced state as to prevent her from being competent to execute a will?

A: I would say yes, making the assumption that she, whoever was in her presence at that time, that you would ask whoever the attorneys or whoever the witnesses to testify to her appearance at that time.

Q: Right.

A: Because I would have no idea whether – I could see that she could have been lucid at that time.

Pam Corvin, who notarized the affidavit signed by the witnesses to the will, testified by affidavit as follows regarding Decedent's mental state when she executed the will:

I traveled with Mr. McPheeters to meet Ms. Hicks and Cecile A. Troutman at Ms. Troutman's residence on January 19. The three of us met with Ms. Troutman in her bedroom. No one else was present in her bedroom during our meeting, which lasted approximately one-half hour;

I noticed at the time that Ms. Troutman was in a weakened physical state and was bedridden. Accordingly, I paid particular attention to Ms. Hicks' conversation with Ms. Troutman. Ms. Hicks asked a number of questions of Ms. Troutman as a means of determining whether Ms. Troutman was lucid and oriented. Although I do not recall any of the specific questions, Ms. Troutman's responsiveness led me to conclude that she was alert and oriented. I was satisfied that she was capable of executing a will;

Ms. Hicks discussed the contents of the proposed will with Ms. Troutman in detail. Ms. Troutman knew the purpose for our visit and stated that it was her desire to execute the document. She obviously understood that she was making a will as she responded to specific questions regarding both her property and the disposition of her property. She indicated that her desires regarding the disposition of her estate were accurately contained in the will. I noticed no unusual or strange conduct on the part of Ms. Troutman that might suggest a demented state. In fact, I recall acknowledging at the time that she was alert and responsive despite her obvious infirmities[.]

Both of the attorneys at the meeting with Decedent, Ms. Hicks and Mr. McPheeters, similarly testified by affidavit that Decedent was alert, oriented, and lucid during the meeting and execution of the will, and that Decedent was aware of what she was doing and how she wanted to dispose of her estate. Although Diane Francisco was present in Decedent's house at the time, it is undisputed that neither she nor anyone else was present at the meeting and execution of the will other than the two attorneys and Ms. Corvin.

The only other proof in the record touching on Decedent's mental state is the affidavit of two of the will contestants, nieces of the Decedent. Joyce Gilliland testified that Decedent had Alzheimer's disease and that "Cecil [sic] did not know me when I was her sitter even though she had seen me for years. She would always talk old times and little else She was not even capable of using the phone." Carol Ray testified that in her opinion the Decedent "did not have the mental capacity to initiate or execute any Will," but elaborates no further than this conclusion in her affidavit, other than noting that Decedent suffered from Alzheimer's disease.

In the case of *Keasler v. Keasler*, 973 S.W.2d 213 (Tenn. Ct. App. 1997), this court noted that the pertinent inquiry "must center on the decedent's mental condition *at the time of execution*

of the will, and a contestant must introduce strong evidence to establish a lack of testamentary capacity *at the time of execution of the will.*” *Id.* at 217 (emphasis added). The Supreme Court restated and applied this principle in *Hammond v. Union Planters Nat. Bank*, 222 S.W.2d 377 (Tenn. 1949), stating, “[w]e find that the court adhered to the well considered rule that there must be ‘material, substantial and relevant evidence’ to show mental incapacity *when the will was executed, and in the absence of it there is no issue for the jury.*” *Id.* at 380 (emphasis added). In the present case, none of the proof presented by the contestants, including Dr. Johnson’s testimony, contradicts the conclusion that at the time of execution of her will, Decedent was in an interval of lucidity and possessed the requisite mental capacity, as unequivocally attested to by the three disinterested witnesses present at the time of execution. We therefore affirm the trial court’s summary judgment in favor of the Executrix on the issue of testamentary capacity.

C. Undue Influence

The contestants’ second argument is that the trial court erred in finding no genuine issue of material fact regarding their allegation of undue influence on the part of Isobel Troutman and the Franciscos. The Supreme Court in *Childress v. Currie* outlined the general principles our courts utilize in addressing a claim of undue influence as follows:

[A] will may be challenged on the basis that the decedent was subject to the undue influence of another in executing the will. In Tennessee, for example, where there is a “confidential relationship, followed by a transaction wherein the dominant party receives a benefit from the other party, a presumption of undue influence arises, that may be rebutted only by clear and convincing evidence of the fairness of the transaction.” *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995) (citations omitted). A confidential relationship is any relationship which gives one person dominion and control over another. *See Mitchell v. Smith*, 779 S.W.2d 384, 389 (Tenn. Ct. App. 1989).

The burden of proof regarding a confidential relationship rests upon the party claiming the existence of such a relationship. *See Brown v. Weik*, 725 S.W.2d 938, 945 (Tenn. Ct. App. 1983). Once a confidential relationship has been shown and a presumption of undue influence arises, the burden shifts to the dominant party to rebut the presumption by proving the fairness of the transaction by clear and convincing evidence. *Matlock v. Simpson*, 902 S.W.2d at 386; *see Gordon v. Thornton*, 584 S.W.2d 655, 658 (Tenn. Ct. App. 1979). To prove the fairness of the transaction, the dominant party may show that the weaker party received independent advice before engaging in the transaction that benefitted the dominant party.

Childress, 74 S.W.3d at 328. In order for the presumption of undue influence to arise, “there must be a showing that there were present the elements of dominion and control by the stronger over the weaker, or there must be a showing of senility or physical and mental deterioration of the donor or that fraud or duress was involved, or other conditions which would tend to establish that the free agency of the donor was destroyed and the will of the donee was substituted therefor.” *Kelly v. Allen*, 558 S.W.2d 845, 848 (Tenn. 1977).

In this case, as regards Mr. and Mrs. Francisco, the actual beneficiaries under the will, there is practically nothing in this record concerning the relationship between them and Decedent nor any proof that would suggest the exercise of dominion and control over Decedent in the disposition of her estate or any other decision. The only evidence in the record referencing the Franciscos (other than the will) is found in contestant Joyce Gilliland’s affidavit, which states that “after [Decedent] became bedridden sometime in 2000 she was completely dependent on Isobel and the Franciscos for her very existence,” and in contestant Carol Ray’s affidavit stating that “In my opinion Cecil [sic] Troutman was unduly influenced to make the Will in question in this case. She was unduly influenced by Isobel Troutman and the Franciscos She was bedridden when she signed and completely at the mercy of Isobel and the Franciscos.” The trial court found that the Franciscos were caregivers to Decedent, which is probably a reasonable inference from the record but is nowhere explicitly stated in the scant evidence presented.

Regarding the allegation of undue influence by Isobel Troutman, Decedent’s sister with whom she lived until Isobel’s death, the contestants rely upon the following testimony of Dr. Johnson:

Q: As between the two ladies, Isobel and Cecile, would you – based on your – on your knowledge of them, would you classify one as dominant and the other subservient in their relationship?

A: Yes.

Q: And who would you say was the dominant figure?

A: Isobel.

Q: All right. And is it possible that – would Cecile follow Isobel’s directions at given times?

A: Yes.

Q: Without question?

A: Yes.

Several observations about the relationship between Isobel Troutman and Decedent are pertinent here. First, there is no evidence that Isobel actually exercised undue influence regarding Decedent’s will. As already noted, the two sisters executed their wills around the same time, and each named the other as the primary beneficiary. Decedent inherited Isobel’s estate when Isobel predeceased her.

Secondly, while Dr. Johnson's testimony above arguably presents a scintilla of evidence suggesting the possible existence of a confidential relationship between the sisters, any exercise of influence on Isobel's part is of very limited relevance here because Isobel, having died first, was not an actual beneficiary under Decedent's will. There is certainly no suggestion that Isobel unduly influenced Decedent to name the Franciscos as contingent beneficiaries as was done in her will. Finally, it is undisputed that Decedent's will was executed with the independent assistance and observation of two attorneys in a meeting at which neither Isobel Troutman nor the Franciscos were present. Under the circumstances presented here, we agree with the trial court that no trier of fact could reasonably conclude that Decedent was subjected to undue influence in the execution of her will, and thus summary judgment was appropriately granted.

IV. Conclusion

For the aforementioned reasons, the trial court's summary judgment holding the will to be valid is affirmed. Costs on appeal are assessed to the Appellant, Carol Ray.

SHARON G. LEE, JUDGE